BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 137 F. (2d) 603 (R. 657-664). The opinion of the United States District Court for the Southern District of New York, dated November 17, 1942, has not yet been officially reported (R. 554-596).

Jurisdiction.

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. A. §347(a); and §24c of the Bankruptcy Act, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 854, 11 U. S. C. A. §47c.

The decree sought to be reviewed was made and filed on September 29, 1943 (R. 675-676).

Statutes Involved.

In connection with the applicable decisions of this Court and of the Court of Appeals declaring the law of New York in this type of case, the statute involved is the New York Personal Property Law, §11 (McKinney's Consolidated Laws of New York, Book 40, §11). The pertinent portion of that statute is as follows:

> "§11. Suspension of ownership
>
> The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a

last will and testament, for not more than two lives in being at the death of the testator; * * *"

Statement of the Case.

The essential facts have been stated under the heading "A" in the accompanying petition. In the interest of brevity they are not repeated here. Any necessary elaboration of those facts in connection with the points of law involved will be made in the course of the argument below.

Specification of Errors.

The Circuit Court of Appeals for the Second Circuit erred in that it:

1. Failed to follow the law applicable to this case as declared by this Court and the Court of Appeals of New York.

2. Construed the letters of November 8, 1934 as creating trusts having a one year time limitation contrary to the provisions of §11 of the Personal Property Law of New York.

3. Held that the transfer in 1937 of the undisbursed balances in the Traco special accounts to the Trapa special accounts affected the nature of the bailment with respect to those funds and funds thereafter transmitted to the Trapa special accounts.

4. Held that Trapa was merely "a new paying agent", and failed to hold that the agency of Traco and then Trapa to pay on behalf of Agecorp was coupled with another agency, *i.e.*, the irrevocable bailment to Traco and then Trapa, as bailee, of the funds to be paid out on behalf of Agecorp, the bailor.

5. The decree in question and every part thereof, in so far as it modified the decree of the District Court, is contrary to the facts and the law.

ARGUMENT

FIRST POINT

The decree in question conflicts with and should be reversed to conform to the applicable decisions of this Court and of the Court of Appeals of New York.

1. The *McKee* Case.

In *McKee* v. *Lamon*, 159 U. S. 317, this Court declared the New York law basic to this case. It held (p. 322):

> "There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The acceptance of the money *with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor. Taylor* v. *Benham*, 5 How. 233, 274; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90, 110; *Barings* v. *Dabney*, 19 Wall. 1; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Keller* v. *Ashford*, 133 U. S. 610; *Union Life Insurance Co.* v. *Hanford*, 143 U. S. 187; *Ryan* v. *Dox*, 34 N. Y. 307; *Story's Equity Jurisprudence*, §§1041, 1255; *Mechem on Agency*, §567."

To the same effect are the following cases in the Court of Appeals of New York involving factual situations indistinguishable from the facts in this case.

2. The *People* Case.

Thus, in *People etc.* v. *The City Bank of Rochester*, 96 N. Y. 32, a firm, which maintained an account with the Rochester bank, wished to pay certain notes payable at

that bank. It sent the bank a check drawn in the following unusual manner (p. 35):

> "$2,963.25 Rochester, N. Y., Nov. 3, 1882.
>
> The City Bank of Rochester,
>
> Pay to *our note due January 6, 1883*, or bearer, two thousand nine hundred and sixty three 25-100 dollars.
>
> Sartwell, Hough & Ford"

The similarity of said check to the checks drawn by Agecorp to the order of the Traco and Trapa special accounts, alone or in conjunction with the transmittal letters or memoranda which accompanied Agecorp's checks, is striking.

The Rochester bank charged said check to the account of said firm, and made an entry in its books to the effect that the note was "paid Nov. 3, 1882". The similarity of said entries on the bank's books to the entries which Agecorp made in its journal to record the "liquidation" of specifically calculated "Accrued Interest" on specifically described securities, alone or in conjunction with Agecorp's entries in its related vouchers, is also striking.

The bank sold the notes supposed to have been paid with the avails of said checks. It then became insolvent. Its receiver refused to pay the notes. The Court of Appeals affirmed a judgment against the receiver and held (pp. 36-37):

> "The transaction in question was *not* between the bank and Sartwell, Hough & Ford in their relation of debtor and creditor *nor* in their relation of bank and depositor. *The object of the latter was to provide a fund for the payment of specific notes, and the engagement of the former was to apply that fund to such payment. Thus a trust was created,* the vio-

lation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled. (*Libby* v. *Hopkins,* 104 U. S. 303; *In re LeBlanc,* 14 Hun, 8; affirmed, 75 N. Y. 598). *Those cases stand upon the ground of a specific appropriation of a particular fund for the payment of the claim there brought in question. So does the one at bar.* That fact is lacking in the case of *People* v. *Merchants and Mechanics' Bank* (78 N. Y. 269), on which the appellant relies; and this distinction is pointed out by the learned judge who delivered the opinion in that case. * * *

The checks of the petitioners were money assets in the hands of the bank and were so treated by all parties; they were delivered to it with *explicit directions* to apply the proceeds on payment of the notes: those directions were assented to by the bank officer, and the checks collected from the general fund. From that moment the bank was bound to hold the money for and apply it to that purpose, and no other, or failing to do so, return it to the petitioner. *As to it, the bank was bailee or trustee, but never owner. It is estopped from saying that all this is matter of book-keeping. It assumed a duty, and the receiver as its representative is bound by it.* Nor does this obligation at all depend, as the appellant seems to suppose, upon the question, when, where and to whom the notes were to be paid; whether presently or in the future is immaterial.

The specific object for which the fund was created was the payment of the notes, and its character does *not* depend upon those incidental circumstances. *The checks were impressed with a trust,* and no change of them into any other shape could divest it so as to give the bank or its receiver any different or more valid claim in respect to them than the bank had before the conversion. (*Van Alen* v. *Am. Nat. Bank,* 52 N. Y. 1; *Dows* v. *Kidder,* 84 *id.* 121.)"

3. The *Shawmut* Case.

Shawmut Corp. v. *Bobrick Sales Corp.*, 260 N. Y. 499, is also closely in point. Schild & Co. had a general balance in the Bank of United States. It directed the bank to debit its account with the amount of a draft drawn by Bobrick and accepted by the bank. The bank did so, by debiting Schild's general account for $4,200 and crediting Schild with that sum in an account entitled "Prepaid Acceptances". The bank then notified Schild that its account had been charged for "acceptance due re-L/C #8853". Here, too, the similarity of said entries on the bank's books to the entries which Agecorp made in its journal, debiting "Accrued Interest"—"liquidation" of which was specifically noted—and crediting "Special Deposits", is striking.

Bobrick sold the draft to Shawmut. The liquidator of the Bank of United States refused to pay the draft. The Court of Appeals affirmed a judgment against the liquidator and held (260 N. Y. 499, 505):

> "* * * *Short of a physical segregation of so much cash, it is difficult to see what more could have been done to put a specific sum of $4,200 into an identified fund.* The facts are in no essential respect different from those in *People* v. *City Bank of Rochester* (96 N. Y. 32). The same result must follow. By a transaction outside of the terms of the letter of credit agreement, Schild & Co. provided a fund for the payment of the draft. The Bank set it aside and engaged to apply it for that purpose. *'As to it, the bank was bailee or trustee.'* (*People* v. *City Bank of Rochester, supra*, p. 37.)
>
> The judgment should be affirmed, with costs."

4. The *Sayer* Case.

In *Sayer* v. *Wynkoop*, 248 N. Y. 54, the Court of Appeals applied this Court's decision in the *McKee* case to a factual situation indistinguishable from the facts in this case. Wynkoop conducted an insurance brokerage business under the name of "Wynkoop Service". A check was sent him to the order of Wynkoop Company for the purpose of transmission by him for the remitter's account to the state insurance fund. The check disclosed on its face that it was drawn on account of "Earned Premium, Policy of State Fund No. 22878-B, subject to final checking." The remitter became bankrupt.

Thereafter, the remitter's receivers transmitted five checks for the same purpose drawn to the order of "Wynkoop Company" or "Wynkoop Service". The first bore on its face the statement "Acct. Compensation Insurance Accd. Comp. Ins."; the second, the statement "a/c Compensation Insurance"; the third, the statement "On account of indebtedness to State Insurance Fund to November 19, 1917"; the fifth, the statement "Premium on account State Insurance Fund". On the reverse side of each check, appeared the following: "Received * * * the amount shown on face of this voucher in full of account as stated thereon." Here, too, the similarity of those notations describing the purpose of the checks, to Agecorp's journal records, transmittal letters and memoranda describing the purpose of its checks, is striking.

Wynkoop endorsed each of those six checks in the name of "Wynkoop Company" or "Wynkoop Service", deposited them, and appropriated the avails thereof. Sayer, the insurance commissioner, sued Wynkoop for the funds on the grounds that they were fixed with a trust status. The Court of Appeals affirmed a judgment in his favor and held (248 N. Y. 54, 59-60):

"In all these cases permitting a recovery by the third person there appears to have been an express promise on the part of the person receiving the moneys to pay them over, or an acknowledgment by him that the moneys were received to be held in trust for such third person. *However, it is apparent that the intention of the owner, and not that of the receiver, is controlling upon the question whether title to the moneys has been transferred and a trust has been created.* True, there must be an assumption of the trust duty by the receiver, but that may arise through implication as well as through expression. *No particular form of words is required either to create the trust or to indicate that a trust duty has been assumed.* 'To constitute a trust there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created.' (ANDREWS, J., in *Beaver* v. *Beaver*, 117 N. Y. 421, at p. 428.) '*Of course particular words, and least of all the specific word "trust", are not necessary to create a trust.*' (HISCOCK, J., in *Title Guarantee & Trust Co.* v. *Haven*, 214 N. Y. 468, at p. 481.) In *McKee* v. *Lamon* (159 U. S. 317, at p. 322) the court said: 'There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter) which he may enforce by bill in equity, if not by action at law. *The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor.*' "

Further on the Court of Appeals held (pp. 63 *et seq.*):

"In reference to the payment of $2,926.60, made by the Metropolitan By-Products Company, Inc., to the defendant under the name of the Wynkoop Company, less is known concerning the intention of the drawer and payee of the check than has been dis-

closed in reference to the payments made by the checks of the receivers. However, it appears upon the face of the check that it was drawn on account of 'Earned Premium, Policy of State Fund No. 22878-B, subject to final checking.' The same statement appears upon the face of the check, as to the receipt which is required to be signed, as appeared upon each of the receivers' checks. Likewise, a similar receipt appears upon the back of the check. We think that sufficient is disclosed to indicate that the drawer of the check intended to transfer irrevocable title to the moneys drawn, and that the payee, the defendant, intended to receive the moneys as trustee or agent for the State Insurance Fund.

On the whole case, therefore, we think the State, in this action for money had and received, was entitled to recover the sums paid to the defendant, and the judgment should be affirmed, with costs."

The facts of this case outlined under the heading "A" of the accompanying petition are strikingly similiar to those in, and are governed by the principles of law set forth in, the *People, Shawmut* and *Sayer* cases. They irresistibly lead to the conclusion that the $192,550.65, undisbursed balance in the Trapa special accounts was part of the funds specifically segregated and appropriated for the purpose of paying interest on Agecorp's debentures. It follows that said balance is fixed with the trust status of an irrevocable bailment for the payment of that interest and that the Circuit Court of Appeals for the Second Circuit erred in holding to the contrary.

SECOND POINT

The Circuit Court erred in construing the letters of November 8, 1934 as creating a trust having a one year time limitation. Such a construction is contrary to the provisions of §11 of the Personal Property Law of New York and the applicable decisions of the Courts of that State.

The Circuit Court's opinion of modification or reversal as to the undisbursed balance in the Trapa special accounts turns upon the effect, as a matter of law, of the so-called *one year* trust letters (R. 663, *et seq.*). The Circuit Court held:

> "* * * But the fact that no demand was made for the return of undisbursed funds is as consistent with the theory *that they were general assets of the Corporation on deposit with its paying agent* as with the view that failure to withdraw them—evidenced an intention to have the trusts continue beyond the expiration of *one year.* * * * Such transfer [from Traco to Trapa] with the Corporation's consent would seem to evidence *a withdrawal by the Corporation of the undisbursed funds* rather than the appointment of a new trustee of them, for the November letters reserved no power to the Corporation or to Traco to appoint a new trustee." (Interpolation in brackets ours.)

It is well established in New York law that a trust for any definite number of years is invalid, in so far as the time limitation is concerned. Where, as here, the purpose of the trust can be effectuated without such invalid trust term, the invalid part is deleted and the trust is performed without it. Thus, in *Matter of Stulman,* 146 Misc. (N. Y.) 861, it was held (p. 867):

> "The limitation of three years on the time of payment is, however, invalid, since it effects a restraint on alienation *for a period measured other than by lives in being at the death of the testator.* (Real Prop. Law, §42; Pers. Prop. Law, §11.) This does not, however, invalidate the entire bequest, *since the illegal direction will be deleted* (*Matter of Hitchcock,* 222 N. Y. 57, 73), with the result that the gifts in question will stand on the same basis as general legacies in respect to which *no limitation is inserted.* While this result may, as suggested, be effected by the application of the principle of acceleration (*Matter of Terwilligar,* 135 Misc. 170, 184; affd., 230 App. Div. 763), such process is really unnecessary, *since by the excision of the ineffectual limitation the direction is valid as it stands.* (*Matter of Terwilligar, supra,* 181, 182; *Matter of Enright,* 139 *Misc.* 192, 199; *Matter of Meyer,* 140 *id.* 1, 5; *Matter of Knoll,* 146 *id.* 613.)"

As appears from *Matter of Hitchcock,* 222 N. Y. 57, 73, and the other cases cited in the above quotation, the rule is applicable to trusts as well as legacies.

Moreover, the transfer of the undisbursed balances in the Traco special accounts to the Trapa special accounts did not destroy the nature of the irrevocable bailment. That transfer involved merely a substitution of bailee. In the *People* case, *supra,* the Court of Appeals stated (96 N. Y. 32, 37):

> "The checks were impressed with a trust, and *no change of them into any other shape* could divest it so as to give the bank or its receiver any different or more valid claim with respect to them than the bank had before the conversion [citing cases]."

It remains but to add that, if the transfer of the undisbursed balances in the Traco special accounts to the Trapa

special accounts be viewed as the mere substitution of one bailee for another to hold and carry out the terms of an irrevocable bailment, this case need not be considered in terms of *inter vivos* trusts at all. The error of the Circuit Court described in this point resulted from its disposition of this case in terms of *inter vivos* trust concepts, rather than in terms of the applicable law of bailment.

THIRD POINT.

The Circuit Court of Appeals erred in failing to hold that the paying agency in this case was coupled with another agency, *i. e.*, that of an irrevocable bailment.

The Circuit Court approached and determined this case as though it were one involving a general deposit with a bank which was to act as a paying agent (R. 661). *Nacional Financiera S. A.* v. *Speyer*, 261 App. Div. 599, cited and relied upon by the Circuit Court of Appeals, is the most recent and typical of that class of cases which, for convenience, may be designated as the bank-depositor cases. The Circuit Court's approach to this case in terms of the bank-depositor cases appears to have been erroneous in two respects.

The essence of all the bank-depositor cases is the existence of a debtor-creditor relationship. In such cases, the depositor is *at all times* free to withdraw the amount deposited. Such right of withdrawal precludes the possibility of, or is inconsistent with, an *irrevocable* bailment of the fund deposited even though the bank has been instructed to pay the deposit out in the form of interest on the depositor's securities.

But there was no debtor-creditor relationship between Agecorp on the one hand, and Traco or Trapa on the other. In 1940, in order to procure the release of the undisbursed funds in the Trapa special accounts from the tax lien of a jeopardy assessment levied thereon by the Internal Revenue Department, Agecorp's treasurer stated under oath that (R. 269):

> "* * * Such funds were not paid to Transfer and Paying Agency for its own use and were not commingled with its general funds. Transfer and Paying Agency has no rightful claim to any part of the said funds and does not make any such claim. * * *
>
> "This affidavit is made in order that the notices of tax liens heretofore served * * * may be vacated * * * *so that said funds may be available for the purposes for which they were originally deposited.*"

Trapa's treasurer filed an affidavit to the same effect and for the same purpose (R. 255, 258).

If there had been a debtor-creditor relationship between Agecorp and Trapa, Trapa's debt to Agecorp in the amounts deposited in the Trapa special accounts would have been distinguishable from Trapa's ownership of those special accounts. In that event, the funds in the special accounts would have been property of Trapa subject to the lien of the jeopardy assessment against Trapa. However, the Internal Revenue Department released that lien because the funds in the special accounts were *not* property of Trapa.

Only two other possibilities remain. Either the paying agency was coupled with a fiduciary obligation on the part of Trapa, as agent, to return those funds to Agecorp, as principal; or those funds were held by Trapa, as bailee, under an irrevocable bailment to pay interest there-

from to the holders of Agecorp's debentures. It adds nothing to the analysis of this case to describe the relationship of Trapa to Agecorp as that of "paying agent." If the description stops short at that point, the nature of the *other* agency, with which that agency was coupled, remains undetermined. In such a case—and that is this case—we must ascertain, in terms of one or the other of the two possibilities described above, the nature of the agency with which the paying agency is coupled. Thus, in *Sayer* v. *Wynkoop*, 248 N. Y. 54, the Court of Appeals noted and described the two two-fold relationship inherent in this type of case as follows (p. 58):

> "* * * Again, the owner may deposit the moneys with a banker with instructions to apply them in satisfaction of the debt of a third person. In that event, the conventional relationship of debtor and creditor between the banker and the depositor is created, *coupled with an agency* on the part of the banker to pay the debt, which is revocable at the will of the depositor. (*Aetna National Bank* v. *Fourth National Bank*, 46 N. Y. 82; *Erb* v. *Banco di Napoli*, 243 N. Y. 45.) *Where, however, the owner delivers the moneys to another upon an agreement that they will be paid to a third person, such third person acquires an equitable interest entitling him to have a recovery in an action for money had and received.*" (Citing cases.)

If the paying agency is not coupled with a debtor-creditor relationship terminable at will, as in the bank-depositor cases from which this case is distinguishable, but is coupled with an agreement that the funds in question shall be paid to third parties, an irrevocable bailment results. The Special Master found this distinction unanswerable (R. 416-418). The Circuit Court of Appeals, without rejecting the distinction, erroneously determined this case in terms of the

concept of a bank acting as paying agent of a depositor who could terminate the agency at will by withdrawing his deposit.

Conclusion.

If the above described errors of law were corrected, this case would take on an altogether different complexion. In that event, the 1934 trust letters and the 1940 jeopardy assessment affidavits which confirm Agecorp's intent to create an irrevocable bailment—alone or in conjunction with the evidence as to the form of Agecorp's book records, checks, letters of transmittal, memoranda, audited accountings and adjustments with Traco and Trapa concerning the funds transmitted, Agecorp's balance sheet declarations, and the testimony as to the exclusive appropriation of the funds—would take this case out of the area in which any Court could feel free to draw the inference that the proven facts are as consistent with holding that the funds in the Trapa special accounts were not intended to be affected by an irrevocable bailment, as they are with the contrary conclusion found below in the opinion and report of the District Court and the Special Master.

Accordingly, for the reasons presented in the foregoing petition and brief, the writ of certiorari prayed for should be granted in order that this Court may review the decision in question and reverse it.

Dated, New York, N. Y., December 28, 1943.

Respectfully submitted,

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